October 29, 2003

Corbin R. Davis
Clerk of the Michigan Supreme Court
PO Box 30052
Lansing, MI 48909

RE: ADM File No. 2002-29

Dear Mr. Davis:

I write this letter in large support of the Proposed Standards for Imposing Lawyer Sanctions published by the Court. My comments will address two issues: the appellate standard of review and the definition of suspension under the Standards. Presently, the standard for review by the ADB of "level of discipline" appeals is that the ADB possesses "a measure of discretion with regard to the appropriate level of discipline." Grievance Administrator v August, 438 Mich 296 (1991); Matter of Daggs, 411 Mich 304 (1981). This derives from the oft-quoted notion that each disciplinary case is *sui generis*. By the passage of time, the accumulated experience of the disciplinary system, and the pending adoption of sanction standards, the days of *sui generis* have passed and, therefore, the present amorphous standard of review should also pass.

As in criminal matters after the adoption of the sentencing guidelines, the standards of review for errors or disputes regarding sentencing were narrowed to reflect a deference to a sentence that appropriately applied the guidelines.[1] That is not to say that the proposed Standards are the equivalent of the criminal sentencing guidelines - they are not. But a sanction issued by a hearing panel, one that properly applied the Standards and articulated its analysis, should not be subject to the same standard of review a panel decision that misapplied, or failed to apply, the Standards.

While the panels and the ADB have improved in articulating their basis for imposing

---

[1]As this Court recently noted, under the legislatively enacted guidelines, the role of the appellate court changed from:

> ...reviewing the trial court's sentencing decision for "proportionality" to reviewing the trial court's sentencing decision to determine, first, whether it is in the appropriate guidelines range and, second, if it is not, whether the trial court has articulated a "substantial and compelling" reason for departing from such range. People v Babcock, 469 Mich 247, 256 (2003).

While this change was mandated by the legislature, it was something of a continuance of the changes effectuated by the Court in Coles and Milbourne. Specifically, the standards of review were becoming less amorphous and more connected to the proceedings or the judicially imposed guidelines. The present situation withing the Standards is analogous.

a sanction since this Court imposed the ABA Standards in Grievance Administrator v Lopatin, still there are unfortunate lapses. In Grievance Administrator v Ballard, a case in which this Court recently denied leave to appeal, both the panel and ADB did not choose a standard under which they were imposing discipline. A reader of the decisions of the panel and the ADB decisions would be hard pressed to understand just how they reached the sanction imposed and why it was not more, or less.

The Court should also reconsider adopting ABA Standard 2.3, which essentially defines suspension as generally being a period of time such that reinstatement is required. The court rules do provide that a hearing panel or the ADB may impose a suspension as low as 30-days, and as high as three years or more. That is a broad range with different benchmark points (180-days requires reinstatement; 3-years requires recertification and reinstatement). However, the proposed Standards recognize no gradation of that broad range. For every Standard that recommends "suspension", panels and the ADB will be looking at a vast span with little reference. While ADB precedent may assist from time to time, a demarcation within the Standards would provide greater assistance. Therefore, I urge this Court to reconsider adoption of ABA Standard 2.3, which would define suspension as requiring reinstatement. That does not prevent a lesser suspension from being imposed via mitigation or via controlling Court precedent, and it gives the Standards some relevant benchmark for the broad suspension range.

The Standards inject accountability, reliability, and some predictability into the sanction process. It is easy to forget that when hearing Lopatin, Grievance Administrator v Underwood, Grievance Administrator v Robert Golden, and Grievance Administrator v Bowman, it was this Court who noted the lack of accountability and analysis in the sanction process. It was this Court who asked all parties to address the issue of whether sanction guidelines were needed. Most replies were that the ABA Standards were a good starting point, with some further stating that they should be modified to recognize Michigan procedures and benchmarks. However, prior to Lopatin, the ABA Standards were, at best, sporadically referenced. It was this Court's action in Lopatin that forced the system to use the ABA Standards with some regularity. And it will be further action by this Court that will compel the routine use of the Standards. This can be achieved, in part, by the adoption of ABA Standard 2.3 and by adjusting the standard of review as the Court and the legislature did after the implementation of the judicial and legislative criminal sentencing guidelines.

Very truly yours,

Patrick K. McGlinn
Associate Counsel
Attorney Grievance Commission

/pkm